IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

OJ APPEAL No.47 of 2005
in
OFFICIAL LIQUIDATOR REPORT No.68 OF 2005
IN
COMPANY PETITION No.205 OF 2005

with
OJ CIVIL APPLICATION No.224 OF 2005
in
OJ APPEAL No.47 OF 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHAKALI SCRAP TRADERS - Appellant(s)
Versus
O.L OF G.S.T.C. LTD. (UNIT MONOGRAM MILL) & 2 - Opponent(s)

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Appearance :

MRS SWATI SOPARKAR for Appellant(s) : 1,
MR NITIN K MEHTA for Opponent(s) : 1,
GOVERNMENT PLEADER for Opponent(s) : 2,
RULE SERVED for Opponent(s) : 3,
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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 24/08/2006

C.A.V. JUDGMENT

(Per : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI)

The appellant-Mahakali Scrap Traders has filed this appeal under section 483 of the Companies Act. The order dated 23rd August 2005 passed by the learned Company Judge directing the Liquidator to forfeit the entire amount deposited by the appellant-the highest bidder is under challenge.

2. It is on record that the learned senior counsel Mr.S.N. Soparkar appearing with the learned advocate Mrs.Swati Soparkar for the appellant had sought permission to withdraw Company application No.133 of 2005 on the ground that since considerable time has elapsed and the appellant having invested its funds elsewhere, is not interested in continuing its offer. The learned Company Judge vide order dated 6th July 2005 granted the permission. The relevant part of the order reads as

under:

> “At this stage Mrs.Swati Soparkar learned advocate appearing for the highest bidder, i.e. Mahalaxmi Scrap Traders, who has filed Company Application No.133 of 2005 seeks permission to withdraw this application as the applicant has no more interest in keeping its offer alive. The applicant is therefore, permitted to withdraw this application. Company Application No.133 of 2005 is accordingly disposed of as withdrawn. However, the issue with regard to return of EMD will be decided in OLR No.68/2005.” (emphasis supplied)

On behalf of the appellant it was contended before the learned Company Judge that as Company Application No.133 of 2005 has already been withdrawn, the Earnest Money Deposit (**EMD**) be refunded because 'no valid contract' between the highest bidder and the Official Liquidator had ever come into existence. In the alternative it was contended that even if a valid contract had come into being, the Official Liquidator has no right to forfeit the EMD in view of the settled position of law, more particularly section 5 of the Contract Act. It was also contended that it is always open for the offerer to withdraw its offer before it is accepted and once the

offer is withdrawn, the EMD is liable to be refunded.

3. This Court while hearing the OJ Appeal on 19th June 2006 passed the following order:

> "The question posed for consideration is that if the bid with the deposit of certain earnest money is withdrawn before its acceptance or rejection, can the earnest money be forfeited in full or not and whether the submission of for consideration of the bid in itself would be a contract in favour of the bidder so that his case can be considered and in the event of failure to proceed further with the bid or withdrawal of the bid before its acceptance, has the Court any authority to forfeit the earnest money. The parties pray for time to make further research on the submission. With the consent of parties, the matter be taken up on 10/07/2006 at 11:00 am." (emphasis supplied)

4. The learned senior counsel for the appellant reiterated the submissions made before the learned Company Judge that before the bid of the appellant was accepted he had withdrawn the offer and therefore, no valid contract between the appellant and the Official Liquidator came into being. He submitted that in view of

that the appellant is entitled to refund of EMD. He submitted that, there was 'an invitation to offer' by the Official Liquidator. In response to that the appellant submitted its offer and before that offer could be accepted, the appellant had withdrawn its offer therefore, no valid contract came into existence. In such circumstances, the EMD cannot be forfeited. The learned senior counsel further submitted that under section 5 of the Contract Act an offer can be withdrawn at any time before it is accepted and the natural consequence of a withdrawal of the offer before it is accepted should be the refund of EMD.

5. The learned senior counsel referring to the facts of the case submitted that Rs.15 lakhs was paid as EMD on 24th March 2005. As considerable time had elapsed the highest bidder invested its funds elsewhere and did not have interest in continuing its offer. He also submitted that the learned Company Judge having permitted to withdraw Company Application No.133 of 2005, refund of EMD ought to have followed as a natural consequence. He submitted that the learned Company Judge ought to have appreciated that in absence of a valid contract between the appellant-highest bidder and the Official Liquidator, forfeiture of EMD could not have been ordered. The learned senior counsel submitted that withdrawal of an offer before its acceptance is communicated to the

offerer, is a matter of right and the appellant herein exercised that right for which he cannot be punished by forfeiting the EMD. He submitted that even if the acceptance of offer was communicated to the appellant at the conclusion of the Sale Committee Meeting on 24th March 2005, the same was a provisional acceptance, which does not make a binding contract. For a binding contract something more than a mere provisional acceptance is required which was missing in this case and therefore, the learned Company Judge has erred in not granting refund of EMD. The learned senior counsel submitted that it is a matter of record that after the appellant was communicated a provisional acceptance, he moved Company Application No.133 of 2005 seeking confirmation from the Court, but as the same was not granted by the Court, the appellant did not get any right qua the property.

6. In support of the aforesaid submissions the learned senior counsel relied upon the following decisions:

(i)Judgement of Madras High Court in the case of Somasundaram Pillai Vs. Provincial Government of Madras reported in A.I.R. (34) 1947 Madras 366.

(ii) Judgement of Madras High Court in the case of T. Linga Gowder Vs. the State of Madras reported in A.I.R. 1971 Madras 28.

(iii) Judgement of Madhya Pradesh High Court in the

case of Rajendra Kumar Verma Vs. State of Madhya Pradesh and others reported in A.I.R. 1972 Madhya Pradesh 131.

(iv) Judgement of Delhi High Court in the case of M/s Suraj Besan and Rice Mills Vs. Food Corporation of India, reported in A.I.R. 1988 Delhi 224.

Besides, the learned counsel placed reliance on condition no.7 of the terms and conditions, which reads as under:

> "7. The sale committee reserves the right to accept the highest or any offer, which will be subject to the sanction and confirmation of the Hon'ble High Court. The sale committee, subject to the permission of the Hon'ble High Court, reserve right to reject any or all the offers without assigning any reasons thereof and that the decision of the Hon'ble High Court will be binding on the parties."

The learned senior counsel submitted that in view of condition no.7, 'acceptance' conveyed to the appellant was a 'provisional acceptance', which was of no consequence inasmuch as by that provisional acceptance no valid contract came into existence.

7. The question posed to the learned senior counsel by

order dated 19th June 2006 remained unanswered as the learned senior counsel did not focus his attention to the question that the submission of the bid along with the earnest money for consideration of the bid in itself is a contract, in favour of the bidder so that his bid can be considered. In such cases though it appears that, 'the persons are invited to submit their offer, in response to that offers are submitted'. But then what legally happens is, 'there is an offer “to bid”, it is accepted by “bidding”, the moment a bid is made there is a concluded contact between the parties – Liquidator on one hand and the bidder on the other. Under this concluded contract the 'Official Liquidator' gets the EMD while the 'bidder' gets 'a right to get one's bid considered'. Now if before the 'bid is considered' if bidder withdraws the 'bid' 'EMD' which is 'consideration' in this concluded contract is to be forfeited because to get one's 'bid considered' 'earnest money' is asked for. (emphasis supplied)

Once the bid is accepted, the second contract comes into existence. (emphasis supplied)

8. In the present case the appellant did submit his bid, paid the earnest money. But before the results were out, i.e. after the bids of all the parties were considered and the result is communicated, on the ground

of lapse of time, the appellant backed out by withdrawing the bid. Thus, there is a breach of a contract on his part and for that EMD is liable to be forfeited.

In this regard condition no.32 of the terms and conditions is relevant. It reads as under:

> “The offeror shall not be entitled to withdraw or cancel his offer once submitted. If the offeror withdraw or cancel his offer the Earnest Money Deposit shall be liable to be forfeited and he will also be liable to pay the Official Liquidator the loss, damage suffered consequent upon his backing out of their offer. The property/ assets in question will then be re-sold at the risk and consequences of the offeror.”

9. Condition no.32 is in two parts. The first part of the condition provides that the offerer shall not be entitled to withdraw or cancel his 'bid'. The consequence thereof is provided that if the offeror withdraws or cancels his bid the EMD shall be liable to be forfeited.

Then what follows is the second part of the condition that 'if consequent upon backing out of an offeror, the

Official Liquidator suffers any loss or damage, the offeror will be liable to pay the same and this will be determined only after the property/ asset in question is re-sold, at the risk and consequences of the offeror.

10. The Hon'ble the Apex Court had an occasion to deal with a similar question in the matter of State of **Maharashtra Vs. A.P. Paper Mills Ltd.**, reported in A.I.R. 2006 SC 1788. In that case an offer was withdrawn before its validity period, the Hon'ble the Apex Court held that the earnest money is liable to be forfeited. In the case before the Hon'ble the Apex Court, clause 5, entitled “Submission of Tender”, wherein subclause (v) reads as under:

> “5. SUBMISSION OF TENDER:
>
> .. .. ..
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> (v)Once a Tender is tendered the offer shall be considered valid for a period of 45 days from the date of Tender Sale in case of Tenders which are under consideration or till the end of lease period in case of accepted Tenders, as the case may be. If the Tender is withdrawn prior to declaration of Final Sale Result, the amount of Earnest Money Deposit shall be forfeited to the Government.
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> xxx xxx xxx”

The Hon'ble the Apex Court dealing with the aforesaid clause observed that,

> “11. .. .. Therefore, this is not a case which could authorise the Government to recover the loss from the respondent. But it is a case of withdrawal of tender and the effect of it is to be considered. Since the tender is valid for a period of 45 days and withdrawal is before expiry of the period the earnest money is to be forfeited. The stand of the respondent that because of delay in declaration of the final sale results there was no bar on withdrawal of the tender is clearly untenable. Once the tender is withdrawn the result is that the tenderer who withdraws the tender cannot take the stand that since the final sale result has not been declared there is no bar on the withdrawal.”

In view of this authoritative decision of the Hon'ble the Apex Court, which is in almost identical facts, the decisions referred to and relied upon by the learned senior counsel, Mr.Soparkar in support of his submissions are of no help to the petitioner as they are in different set of facts.

11. In the result the appeal fails. It is clarified that this appeal was filed only qua the order passed by the learned Company Judge against the appellant contained in para 15 of the judgement and order, which reads as under:

> "In view of the foregoing discussion, the Court hereby directs the Official Liquidator to forfeit the entire amount of earnest money deposit paid by the highest bidder, i.e. M/s Mahakali Scrap Traders. In absence of any other bidder, the property is not sold and hence, it is premature at this stage to say that any loss or damage is suffered by the Official Liquidator by virtue of withdrawal of an offer by the highest bidder. The Court, therefore, does not express any opinion at this stage. It is, however, open for the Official Liquidator to raise such issue when the property is sold and price fetched is less than Rs.4,31,00,000/-. It is also open for the present highest bidder to raise all its objections, if any claim is made against it by way of damages." (emphasis supplied)

It is only the underlined portion which is the subject

matter of this Appeal." The Appeal is dismissed.

12. In view of the dismissal of the appeal O.J. Civil Application No.224 of 2005 does not survive. The same is disposed of accordingly.

(R.S. GARG, J.)

(RAVI R. TRIPATHI, J.)

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